United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1204

NO. 74-1296

B
P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

COALITION FOR EDUCATION IN DISTRICT ONE, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al.,

Defendants-Appellants,

On Appeal from the United States District Court for the Southern District of New York.

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Statement

This brief is submitted on behalf of Appellants' New York City Board of Elections and Community School Board, District One in reply to appellees' brief.

Argument

There are various factual and legal misstatements in Appellees' brief. Appellants New York City Board of Elections and Community School Board, District One will respond only to the most serious of these.

Appellees' contention that appellants arrived at different conclusions concerning the evidence relating to the absence of materials (Appellees' Brief p. 44) is absurd. Appellant Board of Elections did not agree, as appellees allege, that P.S. 61 and P.S. 160 were proven to be polling sites that serviced predominantly minority voters, but rather pointed to those schools as polling sites advanced by the District Court to support its finding of late openings in exclusively minority areas without recognizing the delays experienced in the admittedly predominantly white polling sites at P.S. 63 and P.S. 154 (pp. 708, appellants' brief). There is absolutely no admission by appellant, Board of Elections, that P.S. 61 and P.S. 160 serviced predominantly minority voters and as appellant Kozlowsky quite correctly points out (Appellant Kozlowsky's brief, p. 31) appellees' own exhibit established that P.S. 61 and P.S. 160 serviced only 40-60% minority voter election districts (A. 248), and it was therefore error for the District Court to conclude that these were predominantly minority polling sites.

Appellees contend that the record is clear that their major interest in the election was in bilingual education and community involvement, and that the election was not fought over the issue of Mr. Luis Fuentes, the

controversal superintendent of District One, as appellants had urged (Appellees' Brief, p. 9). However, the record establishes that the contrary is true. Immediately following the October 16, 1973 suspension of Mr. Fuentes by the appellant Community School Board, District One, the appellees submitted an order to show cause seeking a temporary restraining order to restrain the implementation of said suspension (A. 101, 102). It is obvious from the foregoing that the retention of Mr. Fuentes as Superintendent of District One was very much appellees' major concern.

Appellees' assertion that Mr. Paul Greenberg, director of the special unit established for the Community School Board elections, had testified that inspectors had not been trained for the May 1, 1973 election, is false (pp. 33-34, Appellees' Brief). As pointed out in our main brief (p. 16), there was testimony in the record that each inspector was called to the Board of Elections for training and instruction.

Appellees' reliance upon People &.C v. Beatty, _____ NYS 2d _____ N.Y.L.J., pp 17-18 (Sup. Ct. Kings Co., 9-14-73) as standing for the proposition that there need be no showing that the results of the election would have

changed in order to set aside a proportional representation school board election is misplaced. In Beatty, the defendants had moved to dismiss the complaint, alleging that the plaintiff Attorney General had failed to demonstrate in his complaint that the results of the election would probably have changed, as required by Matter of Ippolito v. Power 22 N.Y. 2d 594. The Court in Beatty held that in a quo warranto proceeding challenging an election held pursuant to a system of proportional representation the complaint need not show the probability of a changed result in order to withstand a motion to dismiss. The Court thereby ordered a trial of the issues. At the trial it was established by the Attorney General and appellant New York City Board of Elections, who had joined in the action, that the instances of forgery were so great (241 forgeries out of 309 signatures in one election district alone) that the results "would have been substantially different" (p. 18 c. 1).

In regard to Bolar v. Dinkins, (Sup. Ct., N.Y. Co., Index No. 11415/73) cited in appellees' brief (p. 52), it must be noted that the appellant Board of Elections, with the concurrence of the Attorney General, consented to the judgment therein when the evidence indicated widespread

fraud and ballot "stuffing" to such a degree that the actual winning candidate could not be determined.

In both Beatty and Bolar, it was the appellant Board of Elections, in comjunction with the Attorney General who had concluded that the degree of fraud and ballot "stuffing" would have affected the outcome of the election. In both Beatty and Bolar the plaintiffs demonstrated exact and definite numbers of ballots affected by the fraudulent conduct and further demonstrated that such irregularities would have affected the outcome of the election.

To support the proposition that they need not show that the number of votes affected would have changed the outcome of the election the appellees rely on the en banc decision of Toney v. White, 488 F. 2d 310 (5th Cir. 1973) (en banc). The statistics cited in Toney v. White, 348 F. Supp. 188, 194 (W.D. Co. 1972) clearly demonsrates that the election was so close that the discriminatory practices would not only "probably", but almost certainly have affected the outcome of the election for most, if not all, of the candidates.

Conclusion

The decision of the District Court should be reversed; the Community School Board elected on May 1, 1973, be reinstated and the order directing the holding of a new election in District One be vacated.

Dated: April 4, 1974

Respectfully submitted,

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JEFFREY S. KARP

of Counsel

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

JEFFREY S KARP being duly sworn, says that on the 5 day of April 1974, he served the annexed Reply Brief upon Charles Williams Esq., the attorney for the Plaintiffs-Appellees herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 10 Columbus Circle in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

JOSEPH F. BRUNO
Notary Public, State of New York
No. 24-5497591
Qualified in Kings County
Commission Expires March 30, 1974

Sworn to before me, this 5 day of April 1974

Joseph F. Bruno

Jeffrey S Karp

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